No. _____

In The
SUPREME COURT OF THE UNITED STATES

Petition For
Writ of Certiorari

L. W. CHARLES, SR., PETITIONER

vs.

J. W. SIMMONS, ET AL., RESPONDENTS

PLAINTIFF'S PETITION

CHARLES W. ANDERSON
Attorney for
Lester W. Charles

INDEX

APPENDIX 1

	PAGE
Opinions Below	6
Jurisdiction	8
Questions Presented for Review	3
Statutes Involved	3

APPENDIX 1 INFRA

Statement of the Case	3
Reasons for Granting the Writ and Extension of Time	7
Appendix	1-5
Service	9

APPENDIX 2

Extension of Time by Court Order	18

APPENDIX 3

Brief and Support of Petition	19
Notice of Intent to Petition to U. S. Supreme Court	30

APPENDIX 4

Service and Notice	35

AUTHORITIES CITED

	PAGE
Title 28 U.S.C.A., Section (1) and (2), 28 U.S.C.A., Section 2101 (c) 2102-33-4-5	19
Title 28 U.S.C.A., Section 1331-2-43	19
Judicial Code, Section 237, Title 28, U.S.C.A., Section 344 (b), Section 350; 245 U.S. 60, 78, Buchanan vs. Warley	19
Hogue vs. Committee for Industry, 307 U.S. 496	19
Fiske vs. Kansas, 274 U.S. 380 (1)	19
U. S. vs. Cruikshank, 92 U.S. 542 (2)	19
Expant vs. Riggins, 134 Fed. S. 404 (4)	19
Barider vs. Connally, 133 U.S. 27	19
So. Ry. vs. Green, 216 U.S. 400	19
Trux, et al. vs. Corrigan, 257 U.S. 312	19
No. P. Ry. Co. vs. No. Dakota, 236 U.S. 585, 593	19
Jones Nat. Bank vs. Yates, 240 U.S. 541, 552	19
Kansas City So. Ry. vs. Albers Com. Co., 223 U.S. 573	19
Cedar Rapids Gaslight Co. vs. Cedar Rapids, 223 U.S. 665, 668	19
Ward vs. Krinsky, 259 U.S. 503	19
Pierre vs. Louisiana, 306 U.S. 354	19
Virginia vs. Rives, 100 U.S. 313, 319	19
Ward, et al. vs. Love County, 253 U.S. 1722 (1)	19

In The
SUPREME COURT OF THE UNITED STATES

No.....

Term.....

LESTER W. CHARLES, SR., PETITIONER

vs.

J. W. SIMMONS, EXECUTOR, ET AL., RESPONDENTS

PLAINTIFF'S PETITION

MS. 113 S. E (2) Rep. (Advanced) No. 7 May 12, 1960, Page 604
Notice of Intent to Appeal or Certiorari Filed and Served April 29, 1960. R. p. 47
Decided March 16, 1960. Note 1.
This case has not been printed in bound Volume either S. E. Reporter or Georgia Reporter.

Petitioner, L. W. Charles, Sr., herewith petitions the Honorable Supreme Court of the United States, for the writ of certiorari in said case to be directed to the Honorable Supreme Court of Georgia and Respondents J. W. Simmons, Executor of the estate of MARTHA C. CHARLES, late deceased of Fulton County, Georgia, et al. and shows.

Said case was decided in the Supreme Court of Georgia, March 16, 1960, judgment and order R.p.41, adversed to your petitioner wherein the Supreme Court of Georgia affirmed the judgment and order by the court upon a general demurrer, R.p.38, grounds one (1) and two (2) without allowing petitioner aforesaid any time and opportunity to amend his bill in equity R.p.6, et seq., against J. W. SIMMONS, Executor, et al., Re-

spondents R. 41, 6—et seq. and 38. Said demurrer, R.p. 33 et seq., was addressed to said bill, R.p.6 et seq. as plead therein and the decision of the trial court, R.p.38 and of the Supreme Court of Georgia were not addressed or considered as to any verdict of a jury as to evidence and adduced conflicting issues in the pleadings and they are not res adjudicata on the merits of said case. The facts alleged in bill were well plead are admitted, argumendo by the demurrers.

Said facts are capable of proof were not admitted in the pleadings (bill and answer). Thus said case is not one to be decided by the court upon demurrer, in equity, wherein there are no agreed stipulations as to facts and where there is no conflicting evidence and is one wherein this Court has authority and jurisdiction of the judgment of a State Court of highest jurisdiction and of last resort to petitioner.

Note: 1. The certified record of above case was deposited with and the Clerk of this Court has it since June 6, 1960. R-1-47, inc.

No petition for a rehearing was filed and considered in said case.

A petition for a rehearing in the Supreme Court of Georgia and the Court of Appeals of Georgia will not be granted as a matter of right. Rule 43 Supreme Court, Code Ga. Sect. 6-16-6.

A petition for certiorari in the Supreme Court of Georgia to be directed to the Court of Appeals of Georgia may be filed, but not be granted as a matter of right. Rule 45, Supreme Court of Georgia.

Both said Appellate Courts of Georgia have jurisdiction of cases within the terms of the Constitution of Georgia, Code Anno. 1933, Article 6, Sec. 1, paragraphs

5-9 and are Courts of review for the correction of errors of law only and not of facts.

The Supreme Court of Georgia has jurisdiction of criminal cases involving capital punishment, constitutional questions, under the United States and of Georgia, cases in equity, extraordinary relief, like injunctions, and quo warranto and mandamus, divorce, certiorari to the Court of Appeals of Georgia, title 2, real estate, habeas corpus, wills and administration of estates, etc. Code 2-3005. Const. Art. 6, Sec. 1, par. 5.

The Supreme Court of Georgia is the Court of highest jurisdiction and last resort to petitioner in said case.

The order and judgment of said court and of the trial court, Fulton Superior Court aforesaid are final judgments adversed to petitioner in the State Courts of Georgia as to said case. R.p.38, 41, supra.

Notice of intent to appeal or certiorari said judgment R. p. 47, supra. Note 1, supra.

No application has been made to the Supreme Court of Georgia, or any Justice thereof for allowance of an appeal in said case to The Supreme Court of The United States.

Copy of the opinion and judgment of the Supreme Court of Georgia is annexed hereto by Appendix 1.

Grounds upon which jurisdiction of this court are invoked, R 47, notice of intention to appeal or certiorari to the Supreme Court of the United States, to-wit, R-47, note 1. supra.

That the grounds of said appeal, petition for certiorari to the Supreme Court of the U. S., or petition to

review said judgment in the U. S. District Courts will be to-wit:

The judgment of the trial court, and as affirmed by the Supreme Court of Georgia on March 16, 1960, contravenes and denies to the plaintiff the equal protection of the law as guaranteed by the U. S. Constitution in that the plaintiff has the legal right to inherit and administer upon his deceased wife's estate as her sole heir at law where she dies intestate and without children and no other heirs at law, and to construe, annul and set aside said alleged will, and whereas she has an interest in or title to certain property which was not devised under any will, she dies intestate respective thereto, wherein the alleged void and fraudulent will was not declared null and void for alleged alienation, chicanery, deception, duress, fraud, misrepresentation and undue influence practiced by the defendant.

That the judgment of the trial court, as affirmed by the Supreme Court of Georgia, contravenes and denies to petitioner due process of law in that the judgment of the trial court and the Supreme Court upon general demurrer dismissing plaintiff's petition and affirmance thereof, denies to him the right of a jury trial wherein his petition does state a cause of action for equitable relief, and where the property in question exceeds the statutory value of $10,000.00, and there is diversity of citizenship of the parties, and wherein questions of fact should be determined by a jury of his peers, and not by the court upon demurrer.

That the decision of the trial court and of the Supreme Court of Georgia contravenes and denies to him his constitutional right to acquire, inherit, enjoy, possess and dispose of property, and that he should not be deprived of same without due process of law, com-

pensation, the right of jury trial, and the protection and guarantee of his property rights, and the protection of a U. S. statute to further enforce the 14th Amendment to the U. S. Constitution guaranteeing the right of "citizens to acquire, enjoy, inherit, possess and dispose of property."

That the decision of the trial court and of the Supreme Court of Georgia contravenes, violates and is contrary to the several decisions of the highest court of the State of Georgia and the United States.

That the questions involved are important, substantial; not frivolous or trifling. Said intent to appeal, petition for certiorari to the Supreme Court of the U. S., or file an original petition for review in the U. S. District Courts is bona fide.

This 29 day of April, 1960.

Reasons for the application for an extension of time are:

Counsel filing this application for an extension of time, CHARLES W. ANDERSON, infra, was not employed until April 21st, 1960, the decision complained of March 16th, 1960, hence said counsel has not had authority, employment and time equal to sixty (60) days from date of judgment March 16th, 1960, R.p. 41, supra. However, said attorney made an effort to and did transmit to the Clerk of this court a typewritten petition, Appendix 2, herewith and brief of law, Appendix 3 herewith, June 6th, 1960, which was returned by the Clerk with a letter dated June 6, 1960, Appendix 4, herewith. Counsel for petitioner believed and was informed (not by the Clerk) that said petition, brief of law in support thereof and record duly certified by the Clerk of the Supreme Court of Georgia

was in substantial compliance with the rules of the Supreme Court of the United States, except the printing required. See copy of Counsel's letter June 5, 1960, Appendix 5, herewith. Counsel is now preparing a revised petition and will immediately obtain the printed copies required under the rules of this Court. This application for an extension of time is bona fide on the part of the petitioner and his Counsel, supra, and is not for the purpose of delay only. Petitioner and his Counsel, supra, are informed and believe that it will be necessary to have said extension of time to present and file said petition and obtain the printing of copies required, supra. The petitioner and his Counsel, supra, are verily advised and believed that they have good cause for a writ of error to this Court in said case, supra and to invoke the authority, jurisdiction, and to review the judgment of the Supreme Court of Georgia, supra, in said case.

"Jurisdiction"

The jurisdiction of this Court is invoked under Section 237, Title 28, U.S.C.A., Sect. 344 (b), Sect. 350, Title 28 U.S.C.A., Section 1257 (1) and (2) 28 U.S.C.A. Sect. 2101 (c) 2102-3-4-5, Title 28 U.S.C.A. Sects. 1331-2-43, the highest court of the State of Georgia having denied to petitioner a title, right, privilege and immunity specially set up and claimed by him under the Constitution of the United States, and of Georgia.

To: Messrs. Sheats, Parker and Webb, Attorneys for J. W. Simmons, Executor of Martha C. Charles, deceased, et al.

Gentlemen: You are hereby notified that we will file with the Clerk of the United States Supreme Court, instanta, a petition for extension of time to file

a revised petition for an appeal or writ of certiorari in the case of Lester W. Charles, Sr. vs. J. W. Simmons, Executor, et al., to review and correct the judgment of the Supreme Court of Georgia March 16, 1960, in above style case, as you were prior notified of intent so to do April 29, 1960.
June 13, 1960.

s/c Charles W. Anderson, Attorney
Attorney for petitioner Lester W. Charles.

Due and legal service of above notice and copy of petition above recited is hereby acknowledged and copy hereof had and received.
June 13, 1960.

s/c Paul Webb, Attorney
Attorney for J. W. Simmons, Executor, et al.

GEORGIA, FULTON COUNTY.

In person appeared before me, the undersigned attesting officer, Charles W. Anderson, who on oath says that he has served counsel of record, Messrs. Sheats, Parker and Webb, by handing a copy to and delivering same to ....., a member of said firm, and copy of above notice and of said petition described in said notice in the case of Lester W. Charles, Sr. vs. J. W. Simmons, Executor, et al. to review the judgment complained of in said notice.

.....

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 13th DAY
OF JUNE, 1960.

.....

N.P. County.
My comm. exp.....

Notice and service is hereby had acknowledged, copy received, of the order extending time to file a revised petition for the Writ of Certiorari in the Supreme Court of the United States in the case of Lester W. Charles, Sr. vs. J. W. Simmons, Extr., et al., to the Supreme Court of Georgia and of the revised petition to be filed in instanta with said Supreme Court of the United States and printed copies are being made.

August....., 1960

Sheats, Parker and Webb.

By.....

Attorney for J. W. Simmons, et al.

APPENDIX 1

Supreme Court of Georgia

MS. S.E. (2) Page 604. D. March 16, 1960.

Lester W. Charles, Sr.

vs.

J. W. Simmons, Extr., et al.

1. The petition to cancel and declare void an acknowledgment of service of application for probate of a will in solemn form and to set aside the probate of the will in solemn form, for fraud, failed to set out a cause of action, as the petitioner, by the exercise of reasonable diligence could have discovered the facts upon which he relies to annul the judgment.

2. Allegations that the petitioner's wife, for several years prior to her death, had on numerous occasions told the petitioner that she was going to leave her property to him at her death and that relying thereon, the petitioner made valuable improvements on the property, fail to set out a cause of action for specific performance of an oral contract to convey real and other property, as no agreement on the part of the wife to leave her property to him in consideration of what he might do is alleged.

3. In the absence of a valid enforceable contract, a cause of action will not lie against one charged with causing another to breach his contract to the damage of the latter.

Code 37-211, 37-707, 37-211.

Equitable Petition, Fulton Superior Court, Judge Pharr.

December 1, 1959.

4. Specific Performance Key 114(2)

Allegations that petitioner's wife had told him, prior to her death, that she was leaving her entire estate to him and that he had, in reliance on her statements, made valuable improvements on property, failed to state cause of action against her devisees and legatees for specific performance of oral contract to convey land and other property as it was insufficient to allege agreement on part of wife.

5. Specific Performance Key 28(1)

Contract on which specific performance is sought must be certain, definite, and clear and so precise in its terms that neither party can reasonably misunderstand it.

6. Torts Key 12

In absence of a valid enforceable contract, cause of action will not lie against one charged with causing another to breach his contract to damage the latter.

Syllabus by the Court.

1. The petition to cancel and declare void an acknowledgment of service of application for probate of a will in solemn form, and to set aside and probate of the will in solemn form for fraud failed to set out a cause of action, as the petitioner, by the exercise of reasonable diligence could have discovered the facts upon which he relies to annul the judgment.

2. Allegations that the petitioner's wife, for several years prior to death, had on numerous occasions told the petitioner that she was going to leave her property to him at her death, and that, relying thereon, the petitioner made valuable improvements on the prop-

erty, fail to set out a cause of action for specific performance of an oral contract to convey real and other property, as, negligence of a party precludes the interference of equity against the judgment. Yopp (York) v. Clopton, 32 Ga. 362; Hill v. Harris, 42 Ga. 412; Redwine v. McAfee, 101 Ga. 701, 704, 29 S.E. 428, 429.

"The Code declares that 'If a party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve' Code 37-211. Any misrepresentation, act, or artifice intended to deceive, and which does deceive another, is such fraud as may authorize cancellation of a written contract; but as this court has often held, a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading." Livingston v. Burnett, 193 Ga. 640, 653, 19 S.E. 2d. 385, 393. See Whitfield v. Whitfield, 204 Ga. 64, 65, 48 S.E 2d. 852. The foregoing principles are applicable to the execution by the plaintiff of the acknowledgment of service and assent to probate of the will in solemn form instanter. The rule, that one who can read must read, was applied by this court to an acknowledgment of service of a bill of exceptions in Bigby v. Powell, 25 Ga. 244.

The plaintiff, by the exercise of the slightest degree of diligence, could have prevented the results of fraud alleged to have been perpetrated upon him. First, he could and should have read what he was signing. Furthermore, the will was not probated in solemn form until May 4, about two weeks after he acknowledged service. He had ample time to discover the fraud and prevent the consequences by the exercise of proper diligence.

(3) The allegations do not show mental incom-

petence of the plaintiff either at the time he signed the acknowledgment of service or during the interval from the day he signed the acknowledgment through May 4. The allegation that Simmons was a frequent visitor in the plaintiff's home and that he had been a close personal, confidential, and business advisor to the plaintiff does not establish the existence of a confidential relationship between them within the meaning of Code 37-707. See Dover v. Burns, 186 Ga. 19(1), 25, 196 S.E. 785, and Lewis v. Foy, 189 Ga. 596, 600, 6 S.E. 25, 788. At the time the fraud was allegedly perpetrated upon the plaintiff, the defendant Simmons had not qualified as executor of the will; so a confidential relationship did not exist between the plaintiff and the defendant Simmons at that time by reason of any executor devisee relationship. By the exercise of reasonable diligence, the plaintiff could have discovered the alleged fraud committed against him; so equity will not relieve him.

(4, 5) 2. The allegation that several years prior to her death, the petitioner's wife said that she had made her last will and testament; that, prior to her last illness, she had time and again during their married life said that she was leaving her entire estate to him at her death; and that he in reliance upon these statements, had made valuable improvements upon the property, fails to state a cause of action for specific performance of an oral contract to convey land or other property. This wholly fails to allege any agreement on the part of the wife to leave him her property in consideration of anything he might do. A contract between the parties is not alleged. Furthermore, a contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. Studer v. Seyer, 69 Ga. 125; no agreement on the part of the

wife to leave her property to him in consideration of what he might do is alleged.

3. In the absence of a valid enforceable contract, a cause of action will not lie against one charged with causing another to breach his contract to the damage of the latter.

The plaintiff, as the sole heir at law of his wife, brought his petition in Fulton Superior Court against the defendants, the devisees and legatees under the will of his wife, seeking to declare null and void and to cancel an acknowledgment of service and assent to probate of the will in solemn form instanter; to set aside the probate of the will in solemn form; to enforce an alleged oral agreement of his wife to leave her property to him upon her death; to enjoin interference with his peaceful possession of the property, further administration by the executor, and further prosecution of a dispossessory warrant brought by J. W. Simmons, a defendant and a devisee under the will; for an accounting; for the appointment of a receiver; and for damages. To a judgment the trial court sustaining a general demurrer to his petition, the plaintiff excepts.

Reed, Ingram & Flournoy, Marietta; Phillips & Johnson, Atlanta, for plaintiff in error.

Sheats, Parker & Webb, Jr., Atlanta, for defendant in error.

MOBLEY, Justice.

(1) 1. The petition fails to set forth a cause of action to vacate and set aside the order probating the will in solemn form, because of alleged fraud of J. W. Simmons in securing the acknowledgment of service

and assent to probate in solemn form instanter from the plaintiff. The petition alleges that the defendant, J. W. SIMMONS, who was named executor of the will, prior to the filing of the will for probate and his qualifications as executor, asked the plaintiff to acknowledge service of the application for probate; that the plaintiff, who was still in a dazed, broken-up, and emotional state on account of the death of his wife, asked J. W. Simmons to read the acknowledgment to him; that the defendant Simmons read the acknowledgment of service but failed to read the words "and hereby assent to the probate of the will in solemn form instanter," which were contained in the acknowledgment; that Simmons did not tell him that he was agreeing to probate of the will in solemn form instanter, but told him that it would not be probated in solemn form until the first Monday in June 1959; that, relying on Simmons' representations, he did not read the acknowledgment of service; that, immediately after signing the acknowledgment of service, he was handed a copy of the will but did not read it for several days; that the day after the entombment of his wife, who died on April 19, 1959, he signed the acknowledgment of service, and the will was probated in common form on April 23, and in solemn form on May 4.

(2) "* * * While the judgment of a court may be set aside for proper cause, it will not be done if the party complaining does not show proper diligence in discovering or attempting to discover the facts upon which he relies to annul the judgment" Hightower v. Williams, 104 Ga. 608, 610, 30 S.E. 862. "Courts of equity grant relief only in favor of the diligent, and this court has uniformly held that equity does not relieve from a judgment which could have been prevented but for the negligence of the complaining party."

Rogers v. Kingsbury, 22 Ga. 60; Vaughn v. Fuller, 23 Ga. 366; Hill v. Hill, 149 Ga. 50, 52, 99 S.E.; Adcock v. Shaw, 167 Ga. 710, 146 S. E.478; Blumenfeld v. Citizens' Bank & Trust Co., 168 Ga. 322, 147 S.E. 579; Harris v. Tripp, 209 Ga. 369, 372, 72 S.E. 2d 704, 705.

(6) 3. The petition does not state a cause of action for damages on account of alleged wrongful acts, deeds, and conduct of the defendant. As we construe this contention it is that the plaintiff is entitled to damages because the defendants have wrongfully interfered with his contractual rights to be named beneficiary in the will of his wife.

While it is actionable to maliciously and without justifiable cause induce one to break his contract with another to the damage of the latter (Lake v. DePree, 158 Ga. 590, 595 (1), 124 S.E. 13, and cases cited), this presupposes the existence of a valid, enforceable contract; and where, as here, there was no such contract and the plaintiff had no contractual rights to be violated, a cause of action will not lie therefor. Baker v. American Oil Co., 90 Ga. App. 062 83, S.E. 2d 826.

Judgment affirmed. All the Justices concur.

APPENDIX 2

SUPREME COURT OF THE UNITED STATES

No.....October Term, 1959

L. W. CHARLES, SR., PETITIONER

v.

J. W. SIMMONS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s).

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including August 13th, 1960.

(S) Hugo L. Black
Associate Justice of the Supreme Court of the United States.

Dated this 13th day of June, 1960.

APPENDIX 3

THE SUPREME COURT OF THE UNITED STATES

Term ..... No. .....

LESTER W. CHARLES, SR., PETITIONER

vs.

J. W. SIMMONS, SR., EXTR. ET AL., RESPONDENTS

M.S. 113 S.E. (2) DECIDED MARCH 16, 1960

"Brief of law in support of Petition for Certiorari" while not exhaustive we cite the following authorities. Title 28 U.S.C.A., Section (1) and (2), 28 U.S.C.A. Sect. 2101 (c) 2102-33-4-5; Title 28 U.S.C.A. Sects. 1331-2-43.

"Every citizen of the United States shall have the same right to inherit, acquire, hold, and/or convey and dispose of real or personal property."

Judicial Code, Sect. 237, Title 28, U.S.C.A., Sect. 344 (b), Section 350; 245 U.S. 60, 78, Buchanan vs. Warley; Hogue vs. Committee for Industry, 307 U.S. 496; Fiske vs. Kansas, 274 U.S. 380 (1); U. S. vs. Cruikshank, 92 U.S. 542 (2); Expant vs. Riggins, 134 Fed. S. 404 (4); Barider vs. Connally, 133 U.S. 27; So. Ry. vs. Green, 216 U.S. 400; Trux, et al. vs. Corringan, 257 U.S. 312; No. P. Ry. Co. vs. No. Dakota, 236 U.S. 585, 593; Jones Nat. Bank vs. Yates, 240 U.S. 541, 552; Kansas City So. Ry. vs. Albers Com. Co., 223 U.S. 573; Cedar Rapids Gaslight Co. vs. Cedar Rapids, 223 U.S. 665, 668; Ward vs. Krinsky, 259 U.S. 503; Pierre vs. Louisiana, 306 U.S. 354; Virginia vs. Rives, 100 U.S. 313, 319; Ward, et al. vs. Love County, 253 U.S. 1722(1).

A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars, a Suit in Equity, and if by the law obtaining in the state, customary or statutory, such a suit may be brought maintained in one of its courts, whatever designation that court may bear, it may be maintained by original progress in the circuit court of the United States, if the parties are citizens of different states, and the amount in controversy is sufficient to give the Circuit Court of the United States jurisdiction.

34 Fed. R. 82, (Miss.) Feb. 10, 1888, Everhart vs. Everhart. The court took jurisdiction of a suit to annul the will, after the state court had admitted the will to probate as valid. Cites Gaines vs. Fuentes, 92 U.S. 10, (1). "In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests with Congress to determine at what time and upon what condition the power may be invoked, whether originally in the Federal Court, or after suit brought in State Court; and in the latter case, at what state of the proceedings,—whether before issue of trial by removal to Federal Court or after judgment upon appeal or writ of error."

In the case of Gaines vs. Fuentes, 92 U. S. 10, the Supreme Court of the United States held, in headnote 4, "Suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is in essential particulars, a suit in equity; and if by the law obtaining in the state, customary or statutory, such a suit may be maintained in one of its courts, whatever designation that court may bear. It may be maintained by original process in

the Circuit Court of the United States. If the parties are citizens of different states, it rests within Congress to determine what time and upon what conditions the power may be invoked, whether originally in the Federal Court, or after suit brought in State Court; and in the latter case, at what state of the proceedings,—whether before issue or trial by removal to Federal Court or after judgment upon appeal or writ of error. In the case of Gaines vs. Fuentes, 92 U.S. 10, the Supreme Court of the United States held, in headnote 4, suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity; and if by the law obtaining in a state customary or statutory, such a suit may be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different states. "In the above case, the Supreme Court directed the Circuit Court to take jurisdiction to annul the will in question, although that will had been held valid by all the courts in Louisiana. Gaines vs. Fuentes, supra. Judgment affirm as to verdict of a jury. W. G. Rodgers vs. Street, administrator, 215 Ga. 643. Key Nos. 119, 121 (2) wills key 58 (1) key 121 (7, 11).

SUPREME COURT OF GEORGIA.

Decided Jan. 8, 1960, Page 598, Mobley, J., all J. J. concurring 112 S.E. 2d (2) "W. G. Rodgers, administrator, filed his petition in the Superior Court of Worth County against Mr. and Mrs. W. T. Street in which he prayed that the defendants be enjoined from the further cutting of timber on a 72 acre tract of land owned by the decedent; that they be required to account for timber already cut; and that the plaintiff recover full

exclusive and quiet possession of the land, which was occupied by the defendants. In the answer to the petition, the defendant, W. T. Street alleged that he was in possession of the premises by virtue of an oral contract made by him with the decedent in September or October, 1951, by which the decedent agreed to turn his farm over to Street, rent free, on a year to year basis and to make a will or like instrument leaving the land in question to W. T. Street; provided Street and his family would move to the farm, and "provide all food, care, attention, cleaning of his room, companionship, laundry, and washing of his clothes, linen, and all household duties." Street further alleged that he had complied with the agreement by moving to the decedent's farm, taking care of him for the remainder of his life, and farming the land, and that although the decedent repeatedly expressed his satisfaction with the agreement, he failed to leave a will devising the land to Street or to make Street a deed to the land. In the answer, Mrs. W. T. Street disclaimed any title to the property in question and stated that she moved to the decedent's farm and performed services for the decedent only as her husband's consort and at his request. The jury found title to the land to be in the defendant, W. T. Street; and the plaintiff excepts to the denial of his amended motion for a new trial on the general grounds.

Ford and Houston, Sylvester, John R. Rogers, Ashburn, for plaintiff in error.

Robert B. Williamson, Sylvester, for defendant in error.

Mobley, Justices. (1)

No. 9

M.S. 113 S.E. (2) 804, Supreme Court of North Car-

olina decided April 27, 1960 Mrs. Myrtle J. Brown and Melvin Johnson, executors under the last will and testament of the late Hassie M. Johnson, and Mrs. Myrtle J. Brown, individually, and Melvin Johnson, individually, vs. Mrs. Mary J. Byrd et al. No. 531. Action for declaratory judgment construing will, the Superior Court, Harrett County, Clawson L. Williams, J., rendered judgment, and an appeal was taken. The Supreme Court, Bobbitt, J. held that where judgment adjudged the only attesting witnesses to will probated as attested will to be beneficiaries judgment was required to be vacated. Judgment vacated. Cause remanded. Wills key No. 703-704(2). Wills key No.116(1). Wills key No. 703-704 where circumstances attendant when will was executed are to be considered in ascertaining intent of fact with reference thereto. (2). Wills key No. 116 where judgment adjudged the only attesting witnesses to will probated as attested will to be beneficiaries, judgment was required to be vacated. G. S. Sect. 31-10. M. S. 87 S. E.(2) No. 10. 1955 Fraud key 1 S. C. When one receives money of another under an understanding, either express or implied, that it is to be applied to a certain purpose, and in violation of such understanding, not only diverts it to other purpose, without consent of the owner, but actually converts it to his own use, such transaction amounts to fraud. Baker Wholesale Co. vs. Fleming, 87 S.E. 2d 876. Key No. 3, N. C. To constitute fraud there must be a false representation, known to be false, or made with reckless indifference as to its truth, and it must be made with intent to deceive.—Lester vs. McLean, 87 S.E. 2nd 886. Key No. 31, S.C. Generally one induced to enter into contract to purchase land by vendor's fraudulent misrepresentations may elect to affirm contract despite fraud, retain property received

thereunder and bring action at law against vendor to recover damages for fraud, set off or recoup such damages, if sued by vendor for agreed price, or rescind sale and recover consideration paid.—Turner v. Carey, 87 S.E. 2d 871. West's Georgia Digest Wills Key 324(2) Wills paragraph IV. Requisites and Validity. (G) Revocation and Revival. Key 167. Revocation by act of testator in general. Ga. A person with testamentary capacity may revoke a will in one of the ways recognized by law unless contractually obligated not to do so.

Code Sects. 113-401-to 113-408.—King vs. Bennett, 110 S.E. 2d 772, 215 Ga. App. 345. Key 297 (4). Revocation. Ga. Where revocation of a will must be presumed because of its destruction in a material part, declarations of testator are admissible to support or rebut the presumption that destruction was the act of testator with intention to revoke.—King vs. Bennett, 110 S.E. 2d 772, 215 Ga. 345. Where under facts presumption arose that cancellation of will was done by testatrix and that she intended to revoke the will, testimony that testatrix had made statements to witnesses or in their presence indicating that testatrix had torn the will with intention of revoking it was properly admitted as against contention that it was mere hearsay and of no probative value. Code, Sect. 113-401 to 113-408-I.D. Key 306.—Revocation. Ga. Evidence demanded a verdict refusing probate of will on ground that testatrix had revoked such will, and hence trial judge did not err in granting a new trial after jury had found in favor of probate of the will. Code, Sects. 113-401 to 113-407—King vs. Bennett, 110 S.E. 2d 772, 215 Ga. 345. Key No. 329(1). Form and sufficiency in general. Ga. In the will contest, where the jury was correctly charged on the issues involved, further charge amplifying the issues did not unduly restrict

the questions made by the caveators, Sheffield vs. Sheffield, 111 S.E. 2d, 218, 215 Ga. 546. Key No. 386—Questions of Fact. Ga. In will contest wherein cross-propounders was in substance and intent the same as the original will executed by the testator, they should admit it to probate, even if the testator had revoked it. Code, Sect. 113-404—Sheffield vs. Sheffield, 111 S.E. 2d 218, 215 Ga 546.

VI. Construction. (3) Nature of estates and interests created. Key 602(6). Conversion into fee simple. Ga. Where will devised to daughter of testator defeasible fee subject to being divested if the daughter should die after marriage and should die without children of her body and should daughter die without marrying and the daughter died without marrying and without children, the devise of the daughter did not revert to the estate of the testator but because a fee simple estate in the successors of the daughter.—Hadison vs. Bridges, 111 S.E. 2d 238, 215 Ga. 546.

562. (E) Vested or contingent estates and interests. Key No. 629. Construction in favor of vesting. Ga. Policy of law is to favor vesting of remainders at earliest possible time unless intention of testator is clearly manifest to the contrary. Code Sects. 85-704, 85-708.—Miller vs. Brown, 109 S.E. 2d 741, 215 Ga. 148. Ga.

SPECIFIC PERFORMANCE

Key 49 (2). Adequacy and sufficiency.

Ga. Fairness of contract, as to which specific performance is sought, and adequacy of consideration therefor are to be determined as of its date, and happening of subsequent events in contemplation of parties does not afford defense.—Shaw vs. Miller, 110

S.E. 2d 759, 215 Ga. 413. In suit for specific performance of agreement by defendants' ancestor to devise to plaintiff realty conveyed by him to her, alleged facts that defendants' ancestor had erected a valuable improvement on land and that such event had been in reasonable contemplation of parties was no defense to grant of relief sought, where it had been entirely up to her whether she improved the property; and, under such circumstances, there could be no question of inadequacy of consideration. Id.

IV. PROCEEDINGS AND RELIEF

Key 114 (1), In General.

Ga. Where petition alleged that contract for sale of a motor court, sought to be specifically performed, was in writing, signed by necessary parties, was certain and fair and for an adequate consideration, and sought to cancel a deed from vendor to his son on ground that it was without consideration and executed as result of fraudulent conspiracy to defeat plaintiff's right to the property, and sought to cancel such deed after which vendor would be in position to perform contract to convey the property, petition alleged a cause of action for specific performance and was not subject to general demurrer. Code Sect. 37-801.—Todd vs. Vivins, 110 S.E. 2d 768, 215 Ga. 402.

Key 123, Trial or Hearing.

Ga. Where facts in specific performance suit are undisputed, it is within peculiar province of jury, rather than judge, to apply principles of equity to facts and make decree thereon. Const. Art. 6, Sect. 4, para. 7.; Code, Section 37-1101,—Shaw vs. Miller, 110 S.E. 2d 759, 215 Ga. 413. Where facts are in dispute a

jury verdict is required and not demurrer or the court. In suit for specific performance of agreement by defendants' ancestor to devise to plaintiff realty conveyed by him to her, defendants' admission of essential allegations of petition—execution of contract, full performance by plaintiff, and nonperformance by defendants' ancestor—and sustention of demurrers to defendants' answer for failure to set up any issuable defense to grant of relief sought, left no issue of fact for submission to jury; and trial court did not err in granting specific performance. Code, Sect. 37-106. Id. Gabriel vs. Berry, 326 U.S. 667 (96 N.E. (2) 243). Decision of state court of highest and last resort, not based on merits where a bill in equity is dismissed on general demurrer was out allowing an opportunity and time to amend and is not res adjucata and not a bar to federal court jurisdiction.

WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA

Ga. Code, 1933, 113-301 et seq. Wills.

Ga. Code, 1933—901 et seq. Descent and Distribution. Each spouse is an heir to the other who dies intestate and has a right to administer decedent's estate. The husband surviving his wife, who dies intestate, leaving no children and no debts is her sole heir and has a right to administer her estate or not. We now have a general statute providing that the ordinary's court on due application may enter a judgment declaring it unnecessary to have an administration, in case of intestate and no debts owing by the deceased.

Gardner vs. Brunswick, Ga. 197, 170; Shippen Lumber Co. vs. Elliott, 124 Ga. 699; Anderson vs. Shepherd,

285 Ill. 544 (121 N.E. 215); 2 C.J.S. p. 57; 16 C.J.S. 1118 Sec. 557; as to fraud: White vs. Roper, 176 Ga. 380; Jacobs vs. Poe, 18 Ga. 346; Pollock vs. Cox, 108 Ga. 420 (2); Blount vs. Dean, Admr. 187 Ga. 494; Gormerly vs. Watson, 177 Ga. 763. Georgia Constitution of 1946. Article 6, Section 1, paragraph 1; Article 6, Section 2, paragraph 4; Georgia Laws 1945 pp. 41, 43; Laws of Inheritance, Distribution, Administration. Code Section 113-901; et seq. Particularly Sections 113-902, 113-903, 113-1001; Ga. Laws 1871-2 p. 48; Ga. Laws 1882-3 p. 47; Ga. Laws 1859 p. 35. Pace vs. Klink, 51 Ga. 22, 222, 223; Jackson vs. Butts, 148 Ga. 315, 316; Cavanaugh vs. Ainchbacker, 36, 506; Urquhart vs. Oliver, 56 Ga. 36; Gibson vs. Carriker, 82 Ga. 47 (2a); Williams vs. Rawlins. 10 Ga. 492; Liptrot vs. Holmes, 1 Kelly Ga. 384; White vs. Roper, supra; Wiggins vs. Blount, 33 Ga. 492; Anderson vs. Burney, 147 Ga. 141, 142; Barham vs. McKinney, 89 Ga. 812; Foster vs. McGinnis, 4 Ga. 377; Guess vs. Morgan, 196 Ga. 265; Mandeville vs. Mandeville, 35 Ga. 243; Morgan vs. Woods, 69 Ga. 599; Mulligan vs. Mulligan, 39 S. E.(2) 699; Murphy vs. Pound, 12 Ga. 278; Newborn vs. Cogburn, 30 Ga. 295; Shelton vs. Wright, 25 Ga. 636; Tedder vs. Stiles, 15 Ga. 1, 2; Battle vs. Royster Guano Co., 155 Ga. 322 (118 S.E. 343); Stanley vs. Warner Bros. Pictures, 64 Ga. App. 228 (12 S.E. (2) 441); Broomleg. MX 7th Edition, Stare Decisis, p. 147; Article 6, Section W 2, paragraph 7, Georgia Constitution, Ga. Laws 1945 pp. 44-46. "The decisions of the Supreme Court shall bind the Court of Appeals as precedents." The Appellate Court of Georgia are created and exist now for the correction of errors of law, not for facts. Ga. Constitution Code 1933 2-3704 et seq., Ga. Laws 1945 p. 44-46, supra. Other states constitutional provisions are. . . Georgia Constitution protection of the citizens of life, free-

dom, rights and property is the paramount duty of the state, all impartial and complete. Ga. Code 1933, Sec. 2-102, 2-103. Due process of law no person shall be deprived of life, liberty of property without rights to court and due process of law; 2-105 Jury. 2-123 Citizens, Protection of; 2-206 Liberty; 2-206 Fraud and Concealment of property. 2-301; 2-401 Uniformity of Laws in General; 2-503 Rights of Citizens.

APPENDIX 4

IN THE SUPREME COURT OF THE STATE OF GEORGIA

LESTER W. CHARLES, SR.
vs.
J. W. SIMMONS, et al.

NO. 20805
TO THE CLERK OF THE SUPREME COURT OF GEORGIA

NOTICE OF APPEAL, CERTIORARI TO THE SUPREME COURT OF THE U. S., OR TO FILE AN ORIGINAL ACTION IN THE U. S. DISTRICT COURT TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF GEORGIA.

You are hereby notified of the intention of the Plaintiff-in-Error, Lester W. Charles, Sr., to file an appeal, a petition for a writ of certiorari to the Supreme Court of the U. S., or an original action for review in the U. S. District Court for the Northern District of Georgia, Atlanta Division, or such other U. S. District Court with venue of the parties, to consider, review, correct and set aside the judgment of the Supreme Court of Georgia entered and published March 16, 1960 in above stated case, wherein the Supreme Court of Georgia affirmed the decision of the Fulton Superior Court dated December 1, 1959, sustaining a general demurrer to and dismissing the petition in equity of the Plaintiff-in-Error, as plaintiff, against J. W. Simmons, et al., Defendants-in-Error, as defendants, in his petition in Fulton Superior Court (Georgia), No. A-75826. Said appeal, petition for certiorari to be filed pursuant to 28 U.S.C.A. Section 1257 (1) and (2), 28 U.S.C.A. Section 2101 (c), Time 90 days, 2102-3-4-5, or said original suit in U. S. District Court to review said judg-

ment of the Supreme Court of Georgia pursuant to 28 U.S.C.A. sections 1331-2-43. The Supreme Court of Georgia entered and published its decision March 16, 1960, affirming the judgment of the trial court of December 1, 1959 upon a general demurrer dismissing plaintiff's petition in equity for equitable and other relief, to which judgment upon demurrer plaintiff sued out a direct bill of exceptions to the Supreme Court of Georgia in the manner and timely as provided by law, assigning error thereon to the Supreme Court of Georgia.

The Supreme Court of Georgia is the highest court of jurisdiction to consider, review, reverse or affirm said judgment of Fulton Superior Court.

The remittitur of the Supreme Court of Georgia has been sent down and made the judgment of the Fulton Superior Court. The Supreme Court of Georgia is the highest and last court of resort in said state to said petitioner, Lester W. Charles, Sr., in said case, and its said judgment is one of final determination.

You are respectfully requested to present the question of withholding the court's remittitur and stay the execution of its judgment and the judgment of the trial court pending the determination of said case in the Supreme Court of the U. S. and the District Court of the U. S. to the Supreme Court of Georgia. Said intention to file an appeal, petition for certiorari, pursuant to 28 U.S.C.A. section 1257 (1) and (2), 28 U.S.C.A. section 2101 (c), 2102-3-4-5 to the Supreme Court of the U. S., or an original suit to review said judgment pursuant to 28 U.S.C.A. sections 1331-2-43 is bona fide.

The federal question involved in this case and urged to be determined is to wit:

The judgment of the trial court, and as affirmed by the Supreme Court of Georgia on March 16, 1960, contravenes and denies to the plaintiff the equal protection of the law as guaranteed by the U. S. constitution in that the plaintiff has the legal right to inherit and administer upon his deceased wife's estate as her sole heir at law where she died intestate and without children and no other heirs at law, and to construe, annul and set aside said alleged will, and whereas she has an interest in or title to certain property which was not devised under any will, she died intestate respective thereto, wherein the alleged void and fraudulent will was not declared null and void for alleged alienation, chicanery, deception, duress, fraud, misrepresentation and undue influence practiced by the defendant.

That the judgment of the trial court, as affirmed by the Supreme Court of Georgia, cantravenes and denies to petitioner due process of law in that the judgment of the trial court and the Supreme Court upon general demurrer dismissing plaintiff's petition and affirmance thereof, denies to him the right of a jury trial wherein his petition does state a cause of action for equitable relief, and where the property in question exceeds the statutory value of $10,000.00, and there is diversity of citizenship of the parties, and wherein questions of fact should be determined by the jury of his peers, and not by the court upon demurrer.

That the decision of the trial court and of the Supreme Court of Georgia contravenes and denies to him his constitutional right to acquire, inherit, enjoy, possess and dispose of property, and that he should not be deprived of same without due process of law, compensation, the right of jury trial, and the protection and guarantee of his property rights, and the protection

of a U. S. statute to further enforce the 14th Amendment to the U. S. Constitution guaranteeing the right of all citizens to acquire, enjoy, inherit, possess and dispose of property.

That the decision of the trial court and of the Supreme Court of Georgia cantravenes and denies to him his constitutional right to acquire, inherit, enjoy, possess and dispose of property, and that he should not be deprived of same without due process of law, compensation, the right of jury trial, and the protection and guarantee of his property rights, and the protection of a U. S. statute to further and enforce the 14th Amendment to the U. S. Constitution to guarantee the right of all citizens to acquire, enjoy, inherit, possess and dispose of property.

That the decision of the trial court and of the Supreme Court of Georgia contravenes, violates and is contrary to the several decisions of the highest court of the State of Georgia and the United States.

Respectfully submitted,

911 Ga. Sav. Bank Bldg.
Atlanta 3, Ga. Charles W. Anderson

1608 Blvd Dr., S.E.
Atlanta 17, Ga. Melvin Pazol

P. O. Box 415
Hapeville, Ga. Oze R. Horton

Attorneys for Plaintiff-in-Error, L. W. Charles, Sr.

I do hereby certify that copy of the within and foregoing notice has been mailed to counsel for Defendant-in-Error, post paid this April 22, 1960.

PRAECIPE

1. The petition of L. W. Charles vs. J. W. Simmons, et al., in Fulton Superior Court, No. A-75826, exhibits annexed thereto, and verification thereof.

2. The summons or process and all entries therein in said case.

3. The demurrer of J. W. Simmons, et al., defendants, and all entries thereon, in said case.

4. The plea and answer of J. W. Simmons, et al., defendant, in said case, and verification thereof.

5. The judgment upon demurrer of the trial court in said case, and all entries.

6. The bill of exceptions to the Supreme Court of Georgia, certification thereof, and all entries thereon in said case.

7. The judgment and opinion of the Supreme Court of Georgia and all entries thereon in said case.

8. The remittitur of the Supreme Court of Georgia in said case, and all entries thereon.

9. The notice to the clerk of the Supreme Court of Georgia, dated April 22, 1960, of intent to appeal, certiorari or file an original action, supra, in said case.

That the decision of the trial court and of the Supreme Court of Georgia contravenes, violates and is contrary to the several decisions of the highest court of the State of Georgia and the United States.

That the questions involved are important and substantial, and not frivolous or trifling.

Respectfully submitted,

911 Ga. Sav. Bank Bldg.
Atlanta 3, Ga.

Charles W. Anderson

1605 Blvd. Dr., S.E.
Atlanta 17, Ga.

Melvin Pazol

P. O. Box 415
Hapeville, Ga.

Oze R. Horton
Attorneys for Plaintiff-in Error, Lester W. Charles, Sr.

SERVICE AND NOTICE

To Messrs. Sheats, Parker and Webb, Attorneys,
Hurt Bldg.
Atlanta 3, Ga.

You are hereby notified of intent to file an appeal, petition for certiorari, to the Supreme Court of the U. S., pursuant to 28 U.S.C.A., sections 1257 (1), (2), 28 U.S.C.A. sections 2101 (c), 2102-3-4-5, or an original petition in U. S. District Court for the Northern District of Georgia, Atlanta Division, or such other U. S. District Court with venue of the parties pursuant to 28 U.S.C.A. sections 1331-2-43 to consider, review, correct and set aside the judgment of the Supreme Court of Georgia in case No. 20805, Lester W. Charles, Sr. vs. J. W. Simmons, et al., and to annul and set aside the judgment between said parties in case No. A-75826, Fulton Superior Court, therewith to ask a stay of the judgment of the Supreme Court of Georgia and a stay of the judgment of its execution in Fulton Superior Court in said case between parties until the determina-

tion of his appeal, petition for certiorari by the Supreme Court of the U. S., or his original petition to review said judgment by the U. S. District Court for the Northern District of Georgia, or other U. S. District Court with venue of the parties may be considered, determined, corrected, reversed or affirmed.

That the grounds of said appeal, petition for certiorari to the Supreme Court of the U. S., or petition to review said judgment in the U. S. District Courts will be to wit:

The judgment of the trial court, and as affirmed by the Supreme Court of Georgia on March 16, 1960, contravenes and denies to the plaintiff the equal protection of the law as guaranteed by the U. S. Constitution in that the plaintiff has the legal right to inherit and administer upon his deceased wife's estate as her sole heir at law where she dies intestate and without children and no other heirs at law, and to construe, annul and set said alleged will, and whereas she has an interest in or title to certain property which was not devised under any will, she dies intestate respective thereto, wherein the alleged void and fraudulent will was not declared null and void for alleged alienation, chicanery, deception, duress, fraud, misrepresentation and undue influence practiced by the defendant.

That the judgment of the trial court, as affirmed by the Supreme Court of Georgia, contravenes and denies to petitioner due process of law in that the judgment of the trial court and the Supreme Court upon general demurrer dismissing plaintiff's petition and affirmance thereof, denies to him the right of a jury trial wherein his petition does state a cause of action for equitable relief, and where the property in question exceeds the statutory value of $10,000.00, and there is

diversity of citizenship of the parties, and wherein questions of fact should be determined by a jury of his peers, and not by the court upon demurrer.

That the decision of the trial court and of the Supreme Court of Georgia contravenes and denies to him his constitutional right to acquire, inherit, enjoy, possess and dispose of property, and that he should not be deprived of same without due process of law, compensation, the right of jury trial, and the protection and guarantee of his property rights, and the protection of a U. S. statute to further enforce the 14th Amendment to the U. S. Constitution guaranteeing the rights of "citizens to acquire, enjoy, inherit, possess and dispose of property."

That the decision of the trial court and of the Supreme Court of Georgia contravenes, violates and is contrary to the several decisions of the highest court of the State of Georgia and the United States.

That the questions involved are important, substantial, not frivolous or trifling.

Said intent to appeal, petition for certiorari to the Supreme Court of the U. S., or file an original petition for review in the U. S. District Courts is bona fide.

This 29 day of April, 1960.

Respectfully submitted,

Charles W. Anderson

Melvin Pazol

Oze R. Horton

Attorneys for Plaintiff-in-Error,
Lester W. Charles, Sr.

Copy of above and foregoing notice had and received, and service is hereby acknowledged.

This 29 day of April, 1960.

Parker, Sheats and Webb,
Attorneys for J. W. Simmons, et al.

By .....
Fulton Fed. Bldg., Atlanta 3, Ga.

PRAECIPE

1. The petition of L. W. Charles, Sr. vs. J. W. Simmons, et al., in Fulton Superior Court, No. A-75826, exhibits annexed thereto, and verification thereof.

2. The summons or process and all entries thereon in said case.

3. The demurrer of J. W. Simmons, et al., defendant in said case, and all entries thereon.

4. The plea and answer of J. W. Simmons, et al., defendant, in said case, and verification thereof.

5. The judgment of the trial court in said case, and all entries thereon.

6. The bill of exceptions to the Supreme Court of Georgia, certification thereof, and all entries thereon in said case.

7. The judgment and opinion of the Supreme Court of Georgia, and all entries thereon in said case.

8. Remittitur of the Supreme Court of Georgia in said case, and all entries thereon.

9. The notice to the clerk of the Supreme Court of Georgia, dated April 29, 1960, of intent to appeal, certiorari, or file an original petition, supra, in said case.

GEORGIA, FULTON COUNTY.

In person appeared before me, the undersigned attesting officer, Charles W. Anderson, who on oath says that he has this date served above and foregoing notice, copy thereof being delivered to Hon. Harold E. Sheats, attorney of record for J. W. Simmons, et al., defendants in the matter of Lester W. Charles, Sr. vs. J. W. Simmons, et al., case No. 20805, Supreme Court of Georgia, and No. A-75826, Fulton Superior Court, handing him a correct copy thereof, including notice to clerk, notice to counsel for J. W. Simmons, et al. and praecipe.

s/c Charles W. Anderson

Sworn to and subscribed before
me this 29th day of April, 1960.

s/c Melvin Pazol
N. P. DeKalb County, Ga.
My Commission Expires 5/27/63.

GEORGIA, FULTON COUNTY

In person appeared before me, the undersigned attesting officer, Lester W. Charles, Sr., who on oath says that the facts stated in the foregoing notice are true.

And that he has authorized and employed Messrs. Charles W. Anderson, Melvin Pazol and Oze R. Horton to file and present the above notice, and to bring such actions, appeals, certiorari, and to do such other thing and things as he and they may be advised to do, relative thereto.

Sworn to and subscribed before
me this 22nd day of April, 1960.
s c Melvin Pazol
Notary Public DeKalb County, Ga.
My Commission Expires 5 27/63.

ILE COPY

Office-Supreme Court, U.S.
FILED
OCT 3 1960
JAMES R. BROWNING, Clerk

No. 319

In the Supreme Court of the United States

OCTOBER TERM 1960

L. W. CHARLES, SR., PETITIONER

v.

J. W. SIMMONS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL WEBB, JR.
930 Fulton Federal Building
Atlanta 3, Georgia
Attorney for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	4
Facts	5
Argument	8
I. The Supreme Court of the United States has no jurisdiction in this case because no Federal question of any nature was raised in, considered by, or decided by the State Court.	
II. The petitioner did not exhaust his opportunities for appellate review in the Supreme Court of Georgia.	
Conclusion	11

APPENDIX

Opinion of the Supreme Court of Georgia	12

CITATIONS

Cases:	Page
Brown v. **Colorado,** 106 U. S. 639	10
Chouteau v. **Gibson,** 111 U. S. 200	10
Crowell v. **Randall,** 10 Pet. 368, 398	10
Durley v. **Mayo, Custodian,** 351 U. S. 277	10
Hager v. **California,** 154 U. S. 639	10
Honeyman v. **Hanson,** 300 U. S. 14, 18	10
Maxwell v. **Newbold,** 18 How. 511	10
Mellon Co. v. **McCafferty,** 239 U. S. 134	11
Michigan Sugar Co. v. **Michigan,** 185 U. S. 112	10
Millan, Director General v. **O'Neil,** 275 U. S. 212, 214	10
Mutual Life Ins. Co. v. **McGrew,** 188 U. S. 291	10
Osment v. **Pitcairn,** 317 U. S. 587	11
Sayward v. **Denny,** 158 U. S. 180	10
Winona, etc. Land Co. v. **Minnesota,** 159 U. S. 540	10

Statutes:	
28 U.S.C. Sec. 1257 (3)	1, 2, 8
Sec. 24-4544 of Code of Georgia, 1933 (as amended)	3

In the Supreme Court of the United States

OCTOBER TERM 1960

No. 319

L. W. CHARLES, SR., Petitioner

v.

J. W. SIMMONS, et al.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported in 215 Ga. 794 (113 S. E. 2d 604). The purported transcript of the opinion and decision of the Supreme Court of Georgia as set out in Appendix 1 to the petition for writ of certiorari, pp. 11-17 inclusive, is neither accurate nor complete, and, for the convenience of the Court, the official transcript of this opinion and decision is included in this brief as Appendix 1, beginning at page 12.

JURISDICTION

Although petitioner cites several irrelevant sections of the United States Code Annotated, on page 8 of his petition under the heading "Jurisdiction", it seems clear that jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to review the decision of the Supreme Court of Georgia when:

(a) The validity of no treaty or statute of the United States is drawn in question, and

(b) The validity of no state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; and

(c) Where no title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under, the United States; and

(d) Where no Federal question was raised in, considered by, or decided by the Supreme Court of Georgia in its consideration of this case?

2. Will the Supreme Court of the United States review on petition for certiorari the decision of the Supreme Court of Georgia, when the petitioner did not avail himself of his opportunity to apply to the Supreme Court of Georgia for a rehearing, as provided by the rules of that Court?

STATUTES INVOLVED

I

28 U. S. C. Sec. 1257 (3).

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

'(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.'

II

Rule 40, Rules of the Supreme Court of Georgia; (Sec. 24-4544 of the Code of Georgia).

"24-4544. **Rule 40. Motion, when and how made. Revision of opinions.**—No motion for a rehearing will be considered by this Court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered, and before the remittitur has been forwarded to the clerk of the trial court. An original and six copies will be sufficient.

"(a) The Court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of 10 days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than 10 days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within 10 days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

"(b) No motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the Court, although the clerk may receive any such later motion and deliver the same to the Court for action.

"(c) A rehearing will be granted, on motion of the losing party, only when it appears that the Court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the Court,

or what provision of law or controlling authority has been erroneously construed or misapplied.

"(d) There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the Court he believes that such a fact, statute, or decision, has been overlooked, or that such provision of law or controlling authority has been erroneously construed or misapplied. The motion, when filed, shall show that a copy thereof has been served on opposing counsel, who may thereupon file a brief on the questions raised.

"(e) Repealed.

"(f) If, upon the consideration of a motion for a rehearing, this Court should be of the opinion that its judgment as rendered is correct, but that some revision of the opinion would be appropriate, this Court may, in its discretion and according to its power as heretofore exercised, revise the opinion accordingly, without granting a rehearing; in which event the court shall so advise the clerk, who shall then promptly notify counsel that alterations have been made.

"(g) After motions for rehearing have been disposed of, or in the absence of such motion, the Court or the Justices may revise opinions in accordance with the Code, Sec. 6-1606.

"(h) In so far as practicable, the provisions of this rule shall apply to cases certified to this Court by the Court of Appeals, and to applications for certiorari."

STATEMENT OF THE CASE

The petitioner for writ of certiorari, plaintiff below, as the sole heir at law of his wife, brought his petition in the Fulton County, Georgia, Superior Court, against the defendants who were devisees and legatees under the will of his wife, seeking: (1) to declare null and void and to cancel an acknowledgment of service and assent to probate of the will in solemn form instanter, which he had theretofore signed; (2) to set aside the probate of the will in

solemn form; (3) to enforce an alleged oral agreement of his wife to leave her property to him upon her death; (4) to enjoin interference with his peaceful possession of the property, further administration by the executor, and further prosecution of a dispossessory warrant brought by J. W. Simmons, one of the defendants and a devisee under the will; (5) for an accounting; (6) for the appointment of a receiver; and, (7) for damages.

The trial court sustained the defendants' general demurrer and dismissed the petition on the ground that it did not set out a cause of action against the defendants.

Within the time required by law, the plaintiff filed his writ of error for a review of said judgment in the Supreme Court of Georgia, which entered its judgment affirming the trial court on March 16, 1960. Although the remittitur from the Supreme Court of Georgia was not forwarded to the clerk of the trial court until March 29, 1960, and although the rules and practice in the Supreme Court of Georgia authorize the filing of a motion for a rehearing within ten days following a judgment of that court, no such motion for rehearing was filed by the plaintiff.

The case is before this Court on plaintiff's petition for writ of certiorari to review the decision of the Supreme Court of Georgia.

FACTS

Stripped of its prayers for ancillary relief, together with supporting allegations, plaintiff's petition sought to set out three causes of action:

(1) A cause of action to vacate and set aside the order probating the will in solemn form because of the violation of confidential relationship and fraud of the executor, J. W. Simmons, in securing the acknowledgment of service and assent to probate;

(2) A cause of action for the specific performance of an alleged agreement by plaintiff's wife to execute a will leaving all of her property to plaintiff; and

(3) A cause of action for damages against the defendants for their conduct alleged to have caused plaintiff's wife to breach her contract to execute a will leaving all of her property to him.

With reference to the alleged confidential relationship between plaintiff and defendant, J. W. Simmons, the only material allegations of fact set up in the petition were:

"35. Said Simmons had been a frequent visitor in the home of petitioner and his wife for several years.

"36. Petitioner and his wife had been frequent visitors in the home of said Simmons for several years.

"37. Said Simmons **had been** a very close personal, confidential and business advisor to petitioner for several years." (Emphasis added). (Record in S. Ct. of Ga. 4).

There were no allegations that any confidential relationship existed between plaintiff and defendant J. W. Simmons at the time plaintiff signed the waiver and assent to the probate in solemn form, or that any confidential relationship existed at any time with reference to the subject matter of the transaction, which was the probate of the will.

There was no allegation that at the time he signed the acknowledgment of service and assent to probate in solemn form plaintiff could not read what he was signing, or understand its meaning. To the contrary, he set out several allegations showing that he was mentally competent when he signed the document. In paragraph 54 of the petition, plaintiff alleged that he went to the Court House for the purpose of requesting the defendant J. W. Simmons to help him get the relatives of his wife out of his home, **thinking** that Simmons could and would do so without offending the relatives (Record in S. Ct. of Ga. 6). In Paragraph 61 plaintiff alleged that when Simmons called upon him to sign the acknowledgment of service, plaintiff objected, reminding Simmons of his agreement through petitioner's daughter the day before (Record S. Ct. of Ga. 7). Plaintiff alleged in paragraphs 68 and 69 that after Simmons insisted on plaintiff signing

the acknowledgment of service, petitioner asked Simmons to read what he wanted plaintiff to sign, and that after Simmons read from the document, plaintiff, believing that Simmons had correctly read the acknowledgment of service, that the probate of the will would be in solemn form on June, 1959, and believing that the alleged will was his wife's true last will and testament, and that all he was doing was acknowledging that he had notice of the probate proceedings, plaintiff signed the acknowledgment of service (Record, in S. Ct. of Ga. 9).

It was alleged that when plaintiff signed the acknowledgment of service and the assent to the probate in solemn form, he did this in the Office of the Clerk of Superior Court of Fulton County, Georgia, which was on the same floor with and across the hall from the Office of the Ordinary of Fulton County (Record, in S. Ct. of Ga. 4). There was no allegation that plaintiff asked anyone else who might be in the Court House to read the document to him before he signed it, or that there was any emergency requiring him to sign at that particular moment.

After the acknowledgment of service was signed the will was probated in common form on April 23, 1959 (Record, in S. Ct. of Ga. 12). It was not probated in solemn form until May 4, 1959, eleven days later (Record, in S. Ct. of Ga. 26). There was no allegation that plaintiff was unable to read the will or file his objections to its probate at any time during the eleven day period which elapsed between the time he signed the acknowledgment and assent (which was prior to April 23, 1959), and the day when the order for probate in solemn form was taken on May 4, 1959.

With reference to the alleged oral agreement of plaintiff's wife to execute a will leaving all of her property to plaintiff, the only allegations of fact set out in the petition were:

"14. Several years prior to her death petitioner's said wife said she had made her Last Will and Testament,

"15. Prior to her last illness petitioner's said wife time and again said during their married life that she was leaving her entire estate at her death to petitioner.

"23. Petitioner relied upon his said wife's statements, and acted thereon." (Record, in St. Ct. of Ga. 2).

"129. After said wife assured petitioner that she was going to leave her entire estate to petitioner at her death he believed it and in reliance thereon made valuable improvements to said realty." (Record, in S. Ct. of Ga. 16).

Plaintiff nowhere alleged that his wife made these statements in consideration of any promises or performance of plaintiff, or that plaintiff's wife ever contemplated any agreement in this respect or that there was in fact any meeting of the minds or agreement at all.

No treaty or statute of the United States or statute of any state was ever alleged or interposed at any stage of the proceeding in the trial court or in the Supreme Court of Georgia. No title, right, privilege or immunity claimed under the Constitution, treaty or statutes of, or commission held, or authority exercised under, the United States, was ever alleged or claimed at any stage of the proceedings in the trial court or in the Supreme Court of Georgia.

ARGUMENT

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF GEORGIA IN THE INSTANT CASE BECAUSE NO FEDERAL QUESTION OF ANY NATURE WAS RAISED IN, CONSIDERED BY, OR DECIDED BY THE SUPREME COURT OF GEORGIA OR THE TRIAL COURT.

Although in a paragraph entitled "Jurisdiction" appearing on page eight (8) of his petition, petitioner invokes the jurisdiction of this court under several sections of Title 28 of the U. S. Code, which sections are either non-existent or irrelevant, it seems clear from the language following these citations that petitioner is relying on Section 1257 (3) of Title 28 of the Code, to establish jurisdiction for this review.

Whatever petitioner's contentions in this regard may be, his petition must fail because no Federal question was raised in, considered by, or decided by the Supreme Court of Georgia, or by the trial court. No treaty or statute of the United States was set up in the pleadings, or raised in any stage of the proceedings below. No state statute was drawn into issue on any Federal ground. No title, right, privilege or immunity under the Constitution, treaties, statutes, or other authority of the United States was ever set up or claimed in any way in the trial court, or in the Supreme Court of Georgia.

All issues set up in and decided by the trial court and by the Supreme Court of Georgia involved pure questions of state law. These issues, three in number, were:

1. Did the alleged conduct of the defendant executor, J. W. Simmons, in connection with the probate of the subject will, justify the vacating and setting aside of the order of probate on the ground of fraud under the laws of Georgia?

2. Did the allegations of the petition set up an agreement of the testatrix to make a will in favor of the petitioner, which agreement was subject to specific performance under the laws of Georgia?

3. Did the alleged conduct of the defendants justify a claim for damages against them for interference with any contractural rights of the petitioner?

The trial court and the Supreme Court of Georgia decided each of these questions against the petitioner. In doing so, these state courts discussed only Georgia law. As a matter of fact, counsel for neither petitioner nor the defendants cited or discussed any Federal decisions or principles, and neither counsel nor the courts below ever considered at any stage of the proceedings that any Federal question was involved.

This Court has repeatedly held that it will take jurisdiction to review a decision of a State Court only when a Federal question was actually raised and decided in the State

Court. **Maxwell v. Newbold,** 18 How. 511; **Crowell v. Randall,** 10 Pet. 368, 398; **Brown v. Colorado,** 106 U. S. 639; **Hager v. California,** 154 U. S. 639; **Chouteau v. Gibson,** 111 U. S. 200; **Mutual Life Ins. Co. v. McGrew,** 188 U. S. 291; **Sayward v. Denny,** 158 U. S. 180; **Durley v. Mayo, Custodian,** 351 U. S. 277; **Michigan Sugar Co. v. Michigan,** 185 U. S. 112.

When the validity of no treaty or statute of, or authority exercised under the United States, nor of a statute of, or authority exercised under any state, is drawn into question by a state court, it is essential to the maintenance of jurisdiction in the Supreme Court of the United States that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States, was specially set up or claimed there, and that the decision of the highest court of the State in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed. **Sayward v. Denny,** 158 U. S. 180.

That some Federal question was raised, considered, and decided must affirmatively appear on the face of the record. It is not enough that there may be somewhere hidden in the record a question, which if it had been raised, would have been of a Federal nature. **Millan, Director General v. O'Neil,** 275 U. S. 212, 214. The assertion of a Federal right or claim must be made unmistakably and not left to mere inference. **Winona, etc. Land Co. v. Minnesota,** 159 U. S. 540; **Michigan Sugar Co. v. Michigan,** 185 U. S. 112.

The Federal question must not only have been raised, but its decision must have been necessary to the determination of the case by the state court. **Honeyman v. Hanson,** 300 U. S. 14, 18; **Lynch v. New York,** 293 U. S. 52.

Measured by any or all of these standards petitioner's case fails to show that any Federal question was raised in, considered by, or decided by the Georgia Supreme Court, and it is respectfully submitted that this Court is without jurisdiction in the matter.

II. PETITIONER FAILED TO EXHAUST HIS OPPORTUNITIES FOR APPELLATE REVIEW IN THE STATE COURTS.

Although it is conceded that the decision of the Supreme Court of Georgia rendered on March 16, 1960, became final when the remittitur was forwarded by the Clerk of the Supreme Court to the Clerk of the trial court on March 29, 1960, petitioner was afforded an opportunity under Rule 40 of the Supreme Court of Georgia (Sec. 24-4544 of the Code of Georgia, 1933, as amended), and the practice there prevailing to apply to that court for a rehearing within ten (10) days following the rendition of the judgment on March 16, 1960. This petitioner did not do. This Court held in **Osment v. Pitcairn,** 317 U. S. 587, that failure to exhaust the appellate review provided by state law would require denial of the petition for writ of certiorari for want of jurisdiction. See also **Mellon Co. v. McCafferty,** 239 U. S. 134.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL WEBB, JR.
Attorney for Petitioner.

930 Fulton Federal Bldg.,
Atlanta 3, Georgia.

APPENDIX

Opinion of the Supreme Court of Georgia:

IN THE SUPREME COURT OF GEORGIA
20805. CHARLES v. SIMMONS et al.

1. The petition to cancel and declare void an acknowledgment of service of application for probate of a will in solemn form, and to set aside the probate of the will in solemn form, for fraud, failed to set out a cause of action, as the petitioner, by the exercise of reasonable diligence could have discovered the facts upon which he relies to annul the judgment.

2. Allegations that the petitioner's wife, for several years prior to her death, had on numerous occasions told the petitioner that she was going to leave her property to him at her death, and that, relying thereon, the petitioner made valuable improvements on the property, fail to set out a cause of action for specific performance of an oral contract to convey real and other property, as no agreement on the part of the wife to leave her property to him in consideration of what he might do is alleged.

3. In the absence of a valid enforceable contract, a cause of action will not lie against one charged with causing another to breach his contract to the damage of the latter.

ARGUED FEBRUARY 8, 1960—
DECIDED MARCH 16, 1960.

Equitable petition. Fulton Superior Court. Before Judge Pharr. December 1, 1959.

The plaintiff, as the sole heir at law of his wife, brought his petition in Fulton Superior Court against the defendants, the devisees and legatees under the will of his wife, seeking to declare null and void and to cancel an acknowledgment of service and assent to probate of the will in solemn form

instanter; to set aside the probate of the will in solemn form; to enforce an alleged oral agreement of his wife to leave her property to him upon her death; to enjoin interference with his peaceful possession of the property, further administration by the executor, and further prosecution of a dispossessory warrant brought by J. W. Simmons, a defendant and a devisee under the will; for an accounting; for the appointment of a receiver; and for damages. To a judgment sustaining a general demurrer to his petition, the plaintiff excepts.

Reed, Ingram & Flournoy, Phillips & Johnson, for plaintiff in error.

Sheats, Parker & Webb, Paul Webb, Jr., contra.

MOBLEY, Justice. 1. The petition fails to set forth a cause of action to vacate and set aside the order probating the will in solemn form, because of alleged fraud of J. W. Simmons in securing the acknowledgment of service and assent to probate in solemn form instanter from the plaintiff. The petition alleges that the defendant, J. W. Simmons, who was named executor of the will, prior to the filing of the will for probate and his qualification as executor, asked the plaintiff to acknowledge service of the application for probate; that the plaintiff, who was still in a dazed, broken-up, and emotional state on account of the death of his wife, asked J. W. Simmons to read the acknowledgment to him; that the defendant Simmons read the acknowledgment of service but failed to read the words "and hereby assent to the probate of the will in solemn form instanter," which were contained in the acknowledgment; that Simmons did not tell him that he was agreeing to probate of the will in solemn form instanter, but told him that it would not be probated in solemn form until the first Monday in June 1959; that, relying on Simmons' representations, he did not read the acknowledgment of service; that, immediately after signing the acknowledgment of service, he was handed a copy of the will but did not read it for several days; that, the day after the entombment of his wife, who died on April 19, 1959, he signed the acknowledgment of service, and the

will was probated in common form on April 23 and in solemn form on May 4.

". . . While the judgment of a court may be set aside for proper cause, it will not be done if the party complaining does not show proper diligence in discovering or attempting to discover the facts upon which he relies to annul the judgment." **Hightower v. Williams,** 104 Ga. 608, 610 (30 S. E. 862). "Courts of equity grant relief only in favor of the diligent; and this court has uniformly held that equity does not relieve from a judgment which could have been prevented but for the negligence of the complaining party. **Rogers v. Kingsbury,** 22 Ga. 60; **Vaughn v. Fuller,** 23 Ga. 366. Negligence of a party precludes the interference of equity against the judgment. **Yopp v. Clopton,** 32 Ga. 362; **Hill v. Harris,** 42 Ga. 412." **Redwine v. McAfee,** 101 Ga. 701, 704 (29 S. E. 428).

"The Code declares that if a party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve. § 37-211. Any misrepresentation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract; but, as this court has often held, a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading." **Livingston v. Barnett,** 193 Ga. 640, 653 (19 S. E. 2d 385). See **Whitfield v. Whitfield,** 204 Ga. 64, 65 (48 S. E. 2d 852.) The foregoing principles are applicable to the execution by the plaintiff of the acknowledgment of service and assent to probate of the will in solemn form instanter. The rule, that one who can read must read, was applied by this court to an acknowledgment of service of a bill of exceptions in **Bigby v. Powell,** 25 Ga. 244 (71 Am. Dec. 168).

The plaintiff, by the exercise of the slightest degree of diligence could have prevented the results of fraud alleged to have been perpetrated upon him. First, he could and should have read what he was signing. Furthermore, the will was not probated in solemn form until May 4, about two weeks after he acknowledged service. He had ample

time to discover the fraud and prevent the consequences by the exercise of proper diligence.

The allegations do not show mental incompetence of the plaintiff either at the time he signed the acknowledgment of service or during the interval from the day he signed the acknowledgment through May 4. The allegation that Simmons was a frequent visitor in the plaintiff's home and that he had been a close personal, confidential, and business adviser to the plaintiff does not establish the existence of a confidential relationship between them within the meaning of Code § 37-707. See **Dover v. Burns,** 186 Ga. 19 (1), 25 (196 S. E. 785), and **Lewis v. Foy,** 189 Ga. 596, 600 (6 S. E. 2d 788). At the time the fraud was allegedly perpetrated upon the plaintiff, the defendant Simmons had not qualified as executor of the will; so a confidential relationship did not exist between the plaintiff and the defendant Simmons at that time by reason of any executor-devisee relationship. By the exercise of reasonable diligence, the plaintiff could have discovered the alleged fraud committed against him; so equity will not relieve him.

2. The allegation that, several years prior to her death, the petitioner's wife said that she had made her last will and testament; that, prior to her last illness, she had time and again during their married life said that she was leaving her entire estate to him at her death; and that he, in reliance upon these statements, had made valuable improvements upon the property, fails to state a cause of action for specific performance of an oral contract to convey land or other property. This wholly fails to allege any agreement on the part of the wife to leave him her property in consideration of anything he might do. A contract between the parties is not alleged. Furthermore, "A contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. **Studer v. Seyer,** 69 Ga. 125; **Hill v. Hill,** 149 Ga. 50, 52 (99 S. E. 31); **Adcock v. Shaw,** 167 Ga. 710 (146 S. E. 478); **Blumenfeld v. Citizens Bank & Trust Co.,** 168 Ga. 322 (147 S. E. 579)." **Harris v. Trippi,** 209 Ga. 369, 372 (72 S. E. 2d 704).

3. The petition does not state a cause of action for damages on account of the alleged "wrongful acts, deeds, and conduct of the defendants." As we construe this contention, it is that the plaintiff is entitled to damages because the defendants have wrongfully interfered with his contractual rights to be named beneficiary in the will of his wife.

While it is actionable to maliciously and without justifiable cause induce one to break his contract with another to the damage of the latter (**Luke v. DuPree,** 158 Ga. 590, 595 (1), 124 S. E. 13, and cases cited), this presupposes the existence of a valid, enforceable contract; and where, as here, there was no such contract and the plaintiff had no contractual rights to be violated, a cause of action will not lie therefor. **Baker v. American Oil Co.,** 90 Ga. App. 662 (83 S. E. 2d 826).

Judgment affirmed. All the Justices concur.

CERTIFICATE OF SERVICE

I, Paul Webb, Jr., attorney for the respondent, hereby certify that, on the day of , 1960, I served copies of the within and foregoing brief on behalf of respondent on Charles W. Anderson, Melvin Pazol, and Oze R. Horton, attorneys for the petitioner, by mailing copies in a duly addressed envelope, with first class postage prepaid, to their office at 911 Georgia Savings Bank Building, Atlanta 3, Georgia.

PAUL WEBB, JR.
Attorney for Respondent
930 Fulton Federal Bldg.
Atlanta 3, Georgia.